No. 76-982

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

SAMUEL H. SLOAN, ETC., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-5a) is reported at 535 F. 2d 679.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1976. A petition for rehearing, and suggestion for rehearing *en banc*, were denied on De-

cember 6, 1976 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on January 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' challenge to certain orders issued by the district court was mooted by dismissal of the enforcement action in which those orders were entered.

2. Whether the district court abused its discretion in refusing to adjudge "the [Securities and Exchange Commission], its Commissioners, its Secretary and its counsel in contempt of court and to disbar and disqualify counsel for the S.E.C." because of their alleged violation of an order issued by the court.

STATUTES AND REGULATIONS INVOLVED

The general contempt statute, 18 U.S.C. 401, provides as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Section 17(a) of the Securities Exchange Act of 1934, 48 Stat. 897, as amended, 15 U.S.C. 78q(a), is set forth incorrectly at Pet. 4-5. That provision, at times relevant to the instant petition, stated as follows:

> (a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Pertinent portions of Rule 17a-4, 17 C.F.R. 240. 17a-4 (1975 rev.), are set forth incorrectly at Pet. 5-6. Those provisions, at times relevant to the instant petition, stated as follows:

> (a) Every member, broker and dealer subject to [Section] 240.17a-3 shall preserve for a period of not less than 6 years, the first 2 years in an easily accessible place, all records required to be made pursuant to [Section] 240.17a-3(a)(1), (2), (3), and (5).

(b) Every such member, broker and dealer shall preserve for a period of not less than 3 years, the first 2 years in an easily accessible place:

(1) All records required to be made pursuant to [Section] 240.17a-3(a) (4), (6), (7), (8), (9), and (10).

(2) All check books, bank statements, cancelled checks and cash reconciliations.

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such member, broker or dealer, as such.

(4) Originals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the business of such member, broker or dealer, as such.

(6) All guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to his business as such, including agreements with respect to any account.

STATEMENT

This is one of a series of cases arising out of petitioners' failure to comply with various provisions of the federal securities laws. At the time the dispute originally arose, petitioner Samuel H. Sloan & Co. was registered with the Securities and Exchange Commission as a broker-dealer in securities and petitioner Samuel H. Sloan was that firm's sole proprietor (see Pet. 8). On January 7, 1974, following a trial on the merits, the District Court for the Southern District of New York found that petitioners had willfully violated Sections 15(c)(3) and 17(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 897, as amended, 15 U.S.C. 78o(c)(3) and 78q(a),[1] and various rules promulgated thereunder by, *inter alia*, effecting transactions in securities without having the required net capital and failing to maintain, keep current and preserve required books and records.

The court issued a permanent injunction restraining further such violations of the Securities Exchange Act, noting that the injunction was "necessary to protect the public against the continuation or repetition of the above described violations and [that], unless permanently enjoined, there is a likelihood that [petitioners] will continue to engage in violations of the [Securities] Exchange Act and the Rules promulgated thereunder" (*Securities and Exchange Commission* v. *Sloan*, 369 F. Supp. 996, 1001-1002 (S.D.

[1] Sections 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 have since been amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 121, 137.

N.Y.), appeal dismissed January 7, 1976, No. 74-1436 (C.A. 2), certiorari denied December 13, 1976, No. 76-365.

Following issuance of the injunction, petitioners refused to permit Commission investigators to inspect the books and records of Samuel H. Sloan & Co. (see Pet. 9-13). On December 30, 1974, the Commission filed suit seeking, *inter alia*, an injunction prohibiting petitioners from removing, destroying or altering their books and records and an order requiring them to permit Commission investigators access to such materials (see *id.* at 13).

On January 17, 1975, the district court issued a preliminary injunction requiring petitioners "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. * * *, as required by Section 17a of the [Securities] Exchange Act, 15 U.S.C. 78q(a)[,] and Rule 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-4" (Add., *infra*, pp. 2a-3a). The court also ordered petitioners, *inter alia*, "not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. required to be made, maintained and preserved pursuant to Section 17a of the [Securities] Exchange Act, 15 U.S.C. 78q(a)[,] and Rules 17a-3 and 17a-4 * * *" (*id.* at 3a).[2]

[2] On January 7, 1976, the court of appeals dismissed petitioners' appeal from the preliminary injunction. *Securities and Exchange Commission* v. *Sloan*, No. 75-7056 (C.A. 2), certiorari denied December 13, 1976, No. 76-365.

Despite the preliminary injunction, petitioner Sloan persisted in his refusal to permit members of the Commission's staff to inspect the books and records of Samuel H. Sloan & Co. (Pet. 16-18, 22-23; Pet. App. 52a). On September 3, 1975, the district court issued an order adjudging Sloan in civil contempt (Pet. App. 51a-53a).[3] The court gave Sloan 20 days to purge himself of the contempt by permitting immediate examination by representatives of the Commission and directed that he appear before the court for sentencing on September 26, 1976, should he fail to purge himself of the contempt by that time (*id.* at 53a).

[3] Although the Commission moved on March 24, 1975, for an order adjudging Sloan in contempt (Pet. App. 52a), the court held that motion in abeyance for several months to permit Sloan to recuperate from injuries he had suffered in an accident (*id.* at 82a). On July 22, 1975, the court filed a memorandum finding that Sloan had willfully violated the preliminary injunction the court had issued on January 17, 1975, by refusing to permit members of the Commission's staff to inspect his books and records (see *id.* at 52a). But the court did not at that time order Sloan's imprisonment or impose a fine. Instead, the court ordered "that Sloan's books and records be removed to a place where they may be inspected by representatives of the Commission as directed in the preliminary injunction" (see Pet. 18).

Contrary to petitioner Sloan's representations (Pet. 22, 37), Sloan did not move on July 22, 1975, for an order transferring the case to the United States District Court for the Western District of Virginia. His motion of that date (Pet. App. 38a-39a) contained no prayer for such relief, although the affidavit he submitted in support of the motion did suggest that such a transfer would be appropriate (*id.* at 45a).

On the morning of September 26, 1975, Sloan appeared before the court of appeals in connection with an application he had filed for a stay of the civil contempt order (Pet. App. 78a). Although the court of appeals denied the application for a stay in his presence, he failed to appear before the district court that afternoon for sentencing (*ibid.*). He subsequently left the United States for Iceland (*id.* at 56a, 76a, 79a).

On February 2, 1976, after returning to the United States on the previous day (Pet. App. 79a), Sloan appeared before the district court and agreed to permit Commission representatives to inspect the books and records of Sloan & Co. at his mother's residence in Lynchburg, Virginia (*id.* at 80a-84a). Pending that inspection, he was remanded to the Metropolitan Correctional Center in New York City (*id.* at 80a, 87a). On February 4, 1976, members of the Commission's staff inspected books and records of Sloan & Co. in Lynchburg (*id.* at 87a-88a). Later that day, Sloan and counsel for the Commission again appeared before the district court and the order of civil contempt was discharged (*ibid.*).

Petitioners thereafter appealed the civil contempt order as well as a number of other orders entered by the district court. The court of appeals held that the civil contempt order was not an appealable final order and that, in any event, the appeal from that order was moot since Sloan already had purged himself of the contempt and had been discharged (Pet. App. 3a). The court also held that three additional

orders were not appealable final orders. These included (1) an order denying petitioners' motion to dismiss the Commission's complaint on various grounds, (2) an order granting the Commission's motion for protective relief against certain interrogatories propounded by petitioners, and (3) an order denying a motion to enjoin the Commission from continued "harassment and annoyance" of petitioners (*id.* at 4a-5a).

The court held further that the district court had not abused its discretion in refusing to adjudge "the S.E.C., its Commissioners, its Secretary and its counsel in contempt of court and to disbar and disqualify counsel for the S.E.C." (see Pet. 21) on the ground that a Commission press release had violated a previous order of the court (Pet. App. 3a). Finally, the court rejected petitioners' contention that the Commission was without authority to prosecute actions on its own behalf (*id.* at 4a).[4]

On August 18, 1976, after the court of appeals had rendered its decision, the district court dismissed the Commission's enforcement action as moot (Add., *infra*, pp. 5a-11a).[5] In so doing, the district court stated that petitioners had engaged in the violations alleged in the Commission's complaint and that sum-

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[4] The court of appeals did not expressly rule upon petitioners' further contention that the district judge before whom the case was pending should have recused himself because of alleged bias against petitioners (see Pet. 22; Pet. App. 82a-84a).

[5] Petitioner Sloan did not appeal dismissal of the action.

mary judgment in favor of the Commission would have been appropriate but for two events occurring after entry of the preliminary injunction: the Commission had revoked the broker-dealer registration of Sloan & Co. and had barred petitioner Sloan from association with any broker or dealer;[6] and the Commission had examined the books and records of Sloan & Co. for the years 1971, 1972 and 1973 and ascertained that there were no records for the years 1974 and 1975.

ARGUMENT

As previously noted, on August 18, 1976—following the court of appeals' decision in this case—the district court dismissed the Commission's enforcement action on the ground that such action had become moot. Specifically, the court noted that on April 28, 1975, the Commission had revoked the broker-dealer registration of Sloan & Co. and on February 4, 1976, the Commission had examined the books and records to which it had been seeking access. The court noted further that in a related case (*Securities and Exchange Commission* v. *Sloan*, 369 F. Supp. 996 (S.D. N.Y.), appeal dismissed January 7, 1976, No. 74-1436 (C.A. 2), certiorari denied December 13, 1976, No. 76-365), petitioners had been permanently enjoined, *inter alia*, from further violations of

[6] On November 18, 1976, the court of appeals affirmed the order revoking the broker-dealer registration of Sloan & Co. and barring Sloan from association with any broker or dealer. *Sloan* v. *Securities and Exchange Commission*, 547 F. 2d 152 (C.A. 2).

Section 17(a) of the Securities Exchange Act, 15 U.S.C. 78q(a), and Rule 17a-4 promulgated thereunder (Add., *infra*, pp. 5a-11a).

Since the underlying enforcement action has been dismissed as moot, there is no reason for this Court to consider the questions raised in the petition. All of the orders with respect to which petitioners seek review by this Court were entered in the enforcement action dismissed on August 18, 1976. All but one of those orders either have been complied with or, because the enforcement action has been dismissed, do not have any continuing effect.[7]

As the court of appeals pointed out, Sloan purged himself of contempt by permitting the Commission to inspect the books and records to which the Commission had requested access. Consequently, "no live controversy remains as to any of the alleged errors in the contempt adjudication * * *" (Pet. App. 3a).[8]

[7] Dismissal of the underlying enforcement action arguably did not moot petitioners' request for the imposition of sanctions against the Commission and others for alleged violation of an order of the court restricting the release of information to the press. But as the court of appeals correctly concluded, "[a]ssuming * * * [the order denying such request] is appealable at all, * * * the district judge found that the particular press release that was the subject of Sloan's motion did not violate his order. We see no basis for substituting our judgment for that of the district judge in interpreting his own order" (Pet. App. 3a). See 18 U.S.C. 401.

[8] Petitioners' challenge to the order adjudging Sloan in contempt proceeds from the mistaken premise that the contempt order was criminal, rather than civil, in nature. According to petitioners, (1) any order of contempt issued by a

The fact that Sloan was adjudged in civil contempt did not result, as petitioners suggest (Pet. 33), in

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district court "must be authorized by a specific statute" (Pet. 31), (2) "the only statute which gives a federal court the power to adjudge a person in civil contempt is 28 U.S.C. § 1826 which deals with 'recalcitrant witnesses'" (*ibid.*), and (3) the court therefore "did not and could not have adjudged Sloan to be in civil contempt * * *" (*id.* at 32). This argument overlooks the fact that the general contempt statute, 18 U.S.C. 401, expressly empowers federal courts "to punish by fine or imprisonment, at its discretion, such contempt of its authority * * * as * * * (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Although the general contempt statute is codified as part of the criminal code, this Court concluded in *Penfield Co.* v. *Securities and Exchange Commission*, 330 U.S. 585, in construing the substantially identical predecessor statute (36 Stat. 1163), that the statute governed "civil as well as criminal contempt proceedings" (330 U.S. at 594). As this Court pointed out in *Penfield*, which involved an order of contempt entered against a defendant for refusing to comply with a subpoena *duces tecum* issued by the Commission, "[i]t is the nature of the relief asked that is determinative of the nature of the proceeding. * * * The relief which the Commission sought was production of the documents; and the only sanction asked was a penalty designed to compel their production. Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he has refused to do,' * * * the remedy is one for civil contempt" (330 U.S. at 590). In the present case, the Commission's request for an order adjudging Sloan in contempt was designed solely to compel him to comply with that portion of the preliminary injunction requiring him to permit members of the Commission's staff to inspect his business records in an easily accessible place (see Pet. App. 53a). As soon as Sloan had permitted such inspection, he was discharged (*id.* at 87a-88a). The court of appeals thus correctly concluded that "[t]he order * * * [was] both in form and in substance an order of civil contempt" (*id.* at 3a).

the summary dismissal of other appeals filed by them. Those appeals were dismissed because Sloan had sought to prosecute the appeals while avoiding—by going to Iceland—the imposition of personal sanctions for his refusal to comply with the court's preliminary injunction.[9]

Dismissal of the underlying enforcement action also means that the district court's orders denying petitioners' motion to dismiss the complaint in that action and granting the Commission's motion for protective relief against certain interrogatories are without continuing effect. Neither is there any reason for this Court to consider whether the district judge should have recused himself or whether the Commission is authorized to prosecute actions on its own behalf. Finally, petitioners' allegation that the enforcement action constituted unwarranted harassment has been mooted by the dismissal of that action. Further review of the court's orders is therefore not warranted. See *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583; *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 284; *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461.

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[9] The circumstances underlying dismissal of the appeals are discussed in the brief in opposition filed on behalf of the Commission in *Samuel H. Sloan, et al.* v. *Securities and Exchange Commission, et al.*, No. 76-365 (certiorari denied December 13, 1976).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

DAVID FERBER,
Solicitor to the Commission,

FREDERICK B. WADE,
Attorney,
Securities and Exchange Commission.

MARCH 1977.

ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civil 5729

[Filed Jan. 20, 1975, U.S. District Court,
S. D. of N.Y.]

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

—against—

SAMUEL H. SLOAN, Individually and d/b/a
SAMUEL H. SLOAN & CO., DEFENDANTS

ORDER OF INJUNCTION

This matter having come on for a hearing upon an Order to Show Cause issued on December 30, 1974 by this Court and upon the Complaint in this action and the affidavits of Thomas F. Dolan and Ira B. Spindler in support of the application of the Securities and Exchange Commission for an order to show cause and temporary restraining order, mandatory orders, preliminary and permanent injunctions and after hearing counsel for the Securities and Exchange Commission in support of the motion and defendant Samuel H. Sloan, pro se in opposition thereto, and this Court having signed a Temporary Restraining Order on December 30, 1974 and having extended said Temporary Restraining Order on January 8, 1975 and it appearing that unless

the defendant Samuel H. Sloan, individually and doing business as Samuel H. Sloan & Co. are preliminarily enjoined, violations by the defendants of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. 78q(a) and Rules 15c2-11 and 17a-4 promulgated thereunder, 17 C.F.R. 240.15c2-11 and 240.17a-4 and that immediate and irreparable loss and damage will result to members of the investing public and others, it is hereby

ORDERED, ADJUDGED AND DECREED that Samuel H. Sloan and Samuel H. Sloan & Co., their agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them (or any member or dealer registered with the Commission of which defendant Samuel H. Sloan may become a principal or controlling person), be and they hereby are:

(a) Ordered to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. (or any other broker or dealer registered with the Commission of which Samuel H. Sloan may become a principal or controlling person) as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4

promulgated thereunder, 17 C.F.R. 240.17a-4;

(b) Enjoined from further violations of the examination provisions of Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-4; and

(c) Ordered not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. required to be made, maintained and preserved pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rules 17a-3 and 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-3 and 17a-4; and

(d) Enjoined from further violations of the provisions for initiating over-the-counter quotations of Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2) and Rule 15c2-11 promulgated thereunder, 17 C.F.R. 240.15c 2-11, (a full copy of the Rule is attached hereto and made a part of this Order of Injunction), while and at a time said defendants failed to possess, maintain, preserve or make reasonably available upon request to any person expressing an interest in a proposed transaction in the security being quoted, and/or member of the plaintiff Commission's staff those items of information required to be in the possession of a broker-dealer before a broker-dealer may

lawfully publish any such quotation as required by Rule 17 C.F.R. 240.15c2-11(a)(4) and (c).

It is further ordered that this Court shall retain jurisdiction over this matter for all purposes.

Dated: New York, New York
January 17, 1975
Issued at 6 p.m.

/s/ Robert J. Ward
United States District Judge

JUDGMENT ENTERED: 1-20-75

/s/ Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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74 Civ. 5729—R.J.W.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

—against—

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO., DEFENDANTS

Plaintiff Securities and Exchange Commission ("the Commission") moves pursuant to Rule 56, Fed. R. Civ. P., for summary judgment permanently enjoining defendants from further violations of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(c)(2) and 78q(a) ("the Exchange Act"), and Rules 15c2-11 ("Initiating Quotations in Over-the-Counter Securities") and 17a-4 ("Examination and Visitation Provisions") promulgated thereunder, 17 C.F.R. §§ 240.15c2-11 and 240.17a-4. For the reasons hereinafter stated, the motion is denied and the complaint is dismissed as moot.

From May 10, 1970 to April 28, 1975 Samuel H. Sloan ("Sloan") was the sole proprietor and manager of Samuel H. Sloan & Co. ("the Company"), a

broker-dealer registered with the Commission pursuant to the provisions of § 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

Violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11 promulgated thereunder.[1]

During the period from on or about December 18, 1974 to on or about March 7, 1975, defendants submitted numerous applications ("Forms 211") to the National Quotation Bureau, Inc. ("NQB") for publication of the quotations contained therein in the NQB's "pink sheets," a medium used by brokers and dealers to quote the shares of various companies which are traded in the over-the-counter market.

[1] At the time this action was commenced, Section 15(c)(2) provided as follows:

> No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

Rule 15c2-11 requires that a broker-dealer which publishes a quotation for a security or which, directly or indirectly, submits any such quotation for publication in any quotation medium, either (a) have in his records the most recent annual report of the issuer of such security filed pursuant to Section 13 or 15(d) of the Exchange Act, Rule 15c2-11(a)(3)(iii), or (b) have in his records certain information about the issuer of such security as prescribed by Rule 15c2-11(a)(4).

The Forms 211 submitted by defendants to the NQB did not include most of the information required by Rule 15c2-11 to be possessed by brokers-dealers submitting such applications.

During the hearing on the Commission's motion for a preliminary injunction and for an order permitting examination of the Company's books and records, defendants did not contend that the Company possessed the requisite information but rather that Section 15(c)(2) of the Exchange Act was unconstitutional and the regulations were in excess of the Commission's authority. On February 4, 1976, following the issuance of an order permitting examination of the Company's books and records, representatives of the Commission conducted an examination and ascertained that defendants did not possess any post-1973 reports or prospectuses for those companies with respect to whose shares they had submitted Forms 211 to the NQB for the publication of quotations in the pink sheets during 1974 and 1975. Although the Commission investigators counted approximately fifty boxes and filing cabinet drawers which contained various broker-dealer books and records covering the years 1971, 1972 and 1973, there were no records for the years 1974 and 1975, a cir-

cumstance which supports the conclusion that defendants violated the foregoing section and rule.

Violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.[2]

All brokers and dealers registered with the Commission are subject to the examination provisions contained in former Section 17(a) of the Exchange Act. Section 17(a), now Section 17(a)(1), and Rule 17a-4 promulgated thereunder, require broker-dealers to make, keep, and preserve books and records and

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[2] At the time this action was commenced, Section 17(a) provided in pertinent part:

> (1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

Rule 17a-4 requires that a broker-dealer maintain and preserve certain specified records for periods up to six years. The rule further provides that if a person ceases to be registered, "such person shall, for the remainder of the periods of time specified in this section, continue to preserve the records which he theretofore preserved pursuant to this section."

authorize the Commission to inspect a broker-dealer's books and records.

In its complaint the Commission alleges that during the period from on or about December 26, 1974 to the date of the complaint, December 30, 1974, defendants violated Section 17(a) of the Exchange Act and Rule 17a-4 in that they "refused to produce for examination and maintain in an easily accessible place their books and records."

Defendants do not raise any factual issues regarding the alleged violations. Instead they contend that the statute is unconstitutional and the rules promulgated thereunder are in excess of the Commission's authority. However, the Court of Appeals recently rejected defendants' contentions. *Sloan* v. *SEC*, slip op. 2377, at 2380 (2d Cir. Mar. 4, 1976).

Thus, summary judgment would be appropriate and would have been granted plaintiff but for two events which occurred subsequent to the time the complaint was filed and, in this Court's view, have mooted this action. First, on April 28, 1975, the registration of the Company was revoked by the Commission and Sloan was barred from association with any broker or dealer. *Samuel H. Sloan,* Securities Exchange Act Release No. 11376 (Apr. 28, 1975), appeal pending, *Sloan* v. *SEC*, Dkt. No. 75-4087 (2d Cir.) motion for a stay pending appeal denied (2d Cir. Feb. 13, 1976). Second, as noted above, on February 4, 1976 the Commission examined the Com-

pany's books and records for the years 1971, 1972 and 1973 and ascertained that there were no records for the years 1974 and 1975.

Moreover, in *SEC* v. *Sloan*, 369 F.Supp. 996 (S.D. N.Y. 1974), appeal dismissed, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976), defendants were permanently enjoined from further violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.[3]

As the Supreme Court noted in *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974):

> The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *See, e.g., Roe* v. *Wade*, 410 U.S. [113] 125 [(1973)]; *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403 (1972); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

It might be argued that there is a continuing necessity for injunctive relief here since there is a reasonable expectation of future violations by the defendants. *SEC* v. *Management, Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975). However, since the registration of the Company has been revoked and Sloan has been barred from association with any broker or dealer, adequate remedies are available should either of the defendants engage in future violations.

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[3] This permanent injunction remains in force and is unaffected by the dismissal of this action.

Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed as moot. The dismissal is without costs.[4]

It is so ordered.

Dated: August 18, 1976

/s/ Robert J. Ward
U.S.D.J.

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[4] Inasmuch as this determination is not on the merits, the dismissal of this action shall not serve as a bar should a need for relief arise hereafter.

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